No. 15,969

IN THE

United States Court of Appeals

For the Ninth Circuit

RANDOLPH DALE PEARCE,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLEE.

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JURISDICTION.

Jurisdiction is invoked under Section 1291 Title 28 United States Code. As hereafter will appear, it is the belief of the appellee that there is no jurisdiction to consider this appeal.

STATEMENT OF THE CASE.

Appellant was indicted in the District of Oregon for violation of the Dyer Act, 18 U.S.C. Section 2314, on February 12, 1958. (TR 13-14). On February 19, 1958, the appellant, after having been arrested in the Northern District of California, consented to have the charges against him in the District of Oregon dis-

posed of in the Northern District of California pursuant to the provisions of Rule 20 of the Federal Rules of Criminal Procedure. (TR 4, TR 10.) On March 5, 1958 appellant pleaded guilty to the charges against him in the District of Oregon. (TR 15.) Appellant was then sentenced as a youthful offender under the provisions of the Federal Youth Corrections Act, 18 U.S.C. 5010 (b). On February 25, 1958 appellant noticed a motion for an order directing the Probation Service to allow appellant's counsel to inspect the presentence investigative report. (TR 1.)

Argument on this motion was had on March 5, 1958 (TR 20 through 23). In the course of this argument appellant's counsel indicated that he had discussed orally with the Probation Officer, "at length," the details of the probation report. (TR 20.) The motion to inspect the probation report was denied (TR 17, TR 22). At the time of sentence appellant's counsel requested that the appellant be sentenced as a youthful offender under the provisions of Section 5010 (b) of Title 18 United States Code pursuant to the Federal Youth Corrections Act. Following the Court's sentence, in accordance with appellant's request, under the provisions of the Federal Youth Corrections Act, appellant appealed to this Court from the order denying the motion to inspect the presentence report. (TR 38.)

Appellant specifies alone, as error, the denial of motion to inspect the Probation Service's presentence investigative report (Appellant's Brief pages 3-4). The United States moved to dismiss on the grounds

that appeal was made from a non-appealable order. This motion was denied by the Court of Appeals without prejudice to the United States arguing the question of the order's appealability at the time of the appeal in chief.

QUESTIONS PRESENTED.

1. Is the denial of a motion to inspect a presentence report appealable?

2. Is there a "case or controversy" here presented?

3. Does Rule 32(c) of the Federal Rules of Criminal Procedure provide for inspection of presentence reports?

ARGUMENT.

I. DENIAL OF A MOTION TO INSPECT A PRESENTENCE INVESTIGATIVE REPORT IS NON-APPEALABLE.

This case involves an appeal from an order of the District Court for the Northern District of California denying appellant's motion to inspect the presentence investigation report in connection with appellant's plea of guilty to a violation of Section 2314 of Title 18 United States Code. In a criminal case appeal lies only from the judgment of conviction. *Benson v. United States,* (9th Cir.), 93 F.2d 749. The order of the District Court in denying appellant's motion for inspection of the probation report is not a final order under Section 1291 Title 28 United States Code. In the instant case no question is raised concerning the

validity of the judgment of conviction or the sentence imposed. The only question which is raised concerns the denial of a motion by the Court to allow counsel for appellant to examine the probation report. The order of the Court was not a "final order" and hence is not appealable.

Sentence is within the discretion of the District Court. In *Flores v. United States,* (9th Cir.), 238 F.2d 758 (1956) this Court stated "This Court has no control over a sentence which is within the limits allowed by statute." See also *Brown v. United States,* (9th Cir.), 222 F.2d 293; *Guerrera v. United States,* (8th Cir.), 40 F.2d 338, 340. In the instant case Rule 32 (c) leaves the question of whether or not probation reports should be supplied to defendants to the discretion of the District Court. Matters entirely within the discretion of a trial court can not be made the basis of an appeal. *United States v. Rio Grande Dam and Irrigation Company,* 184 U.S. 416. Unless the due process clause of the Federal Constitution is involved, Appellate Courts have no authority to review the practice of District Courts concerning the confidential nature of probation reports. The granting of probation is a matter entirely within the province of the District Court and the exercise of this power can not be questioned on appeal. *Elder v. United States,* (9th Cir.), 142 F.2d 199. See also *Burns v. United States,* 287 U.S. 216.

Appellant has pointed to no statute or rule of Court which requires that probation reports be supplied to defense counsel. He expressly repudiates any con-

tention that "due process" is an issue in the appeal. (Page 5 appellant's brief.) His claim that disclosure of the report is a matter of right seems in essence to be based on an assertion that disclosure is "better procedure." (Appellant's Brief page 6.) In brief, his claim is based on the desirability of disclosure rather than the illegality of non-disclosure.

His only constitutional attack is based upon the effective assistance of counsel requirements of the Sixth Amendment. If, however, *Williams v. New York,* 337 U.S. 241 has disposed of the question of constitutionality with respect to state non-disclosure, it would seem to be equally dispositive of any constitutional objections which might be urged in Federal Court. The "due process" required under the Fourteenth Amendment includes the assistance of counsel required of the Federal Government by the Sixth Amendment. *Powell v. Alabama,* 287 U.S. 45. *Williams v. New York,* supra, by deciding that due process under the Fourteenth Amendment does not require the production of probation reports equally decides, for the purposes of the Sixth Amendment, that no constitutional infirmity exists. We see no constitutional difference in the requirement of counsel in state courts from that required in Federal Court.

In the absence of constitutional or statutory requirements that probation reports be disclosed, appellant's contention is a request for this Court to assume the rule-making power in Federal Criminal Procedure, which is limited by the Constitution and the statute to the Supreme Court and to the Congress. The rule-

making authority of a Court of Appeals does not extend to enacting rules for the District Court. Rule 57 of the Federal Rules of Criminal Procedure provides that District Court rules shall be promulgated by District Courts. The Supreme Court was given the power by Congress on June 29, 1940 to regulate Federal Criminal Procedure. 54 Stat. 688. This power was not entrusted to the Court of Appeals, and in the absence of any requirement in Rule 32 (c) of the Federal Rules of Criminal Procedure, this Court may not hold that probation reports must be public records. An appeal from a denial of a motion for inspection is, therefore, not reviewable by this Court.

II. DISCLOSURE OF PRESENTENCE REPORTS IS NEITHER DESIRABLE NOR REQUIRED BY RULE 32 (c).

This Court may take judicial notice that probation reports in the Northern District of California, except where contrary provision is expressly made by the Court, are confidential. The Supreme Court in *Williams v. New York,* supra, has had occasion to consider the reason for treating probation reports differently than preconviction evidence. The Court stated: "We must recognize that most of the information now relied upon by Judges to guide them in the intelligent imposition of sentences would be unavailable if information were restricted to that given in open court by witnesses subject to open examination." The Court, in the *Williams* case, held that the Constitution did not require that counsel be allowed an

opportunity to examine the report of the Probation Officer. In *Freedman v. U.S.,* (1st Cir.), 200 F.2d 686 (1952) at 697 the Court held that the report of the Probation Officer was properly no part of the record in the case.

Probation officers who have considered the problem point to the fact that a disclosure of sources of the information contained in a presentence report would result in "drying up" important sources of information. See "The Confidential Nature of Presentence Reports, Catholic University of America Law Review, May 1955 by Lewis J. Sharp, Chief, Division of Probation Administrative Office of the United States Courts." Mr. Sharp says that, page 138, "It is not necessary here to spell out the obvious handicaps probation would encounter in dealing with the medical profession (particularly psychiatrists), government agencies (such as the military services, Veterans Administration), social agencies, families, employers, and neighbors if, under a system of disclosure, these sources were told that any information they would give would be disclosed to the defendant and that the chances were good they would become involved in time-consuming and unpleasant controversies in open court. The rules of many such agencies state that the information in their files is confidential and is to be divulged only to official persons and agencies and then only under rigid requirements covering use of the information. Even individuals without limitation on disclosure would prefer not to give information under any arrangement for unlimited disclosure.

"The Probation Officer would thus be reduced to including in the report only the most elementary factual information from public records and statements about the defendant which either were inconsequential or were in the defendant's favor. The result would be a weak, ineffective report with little or none of the more meaningful data on attitudes, feelings, and personal standards and relationships so essential to adequate presentence investigation reports and probation supervision."

Making probation reports public operates to dry up sources of information; information which is of aid in the delicate job of sentencing. This information is not always, and as a matter of fact is not in a majority of instances, unfavorable to the defendant. A criminal charge necessarily commands the intense scrutiny of the public. Anyone connected with the defendant, particularly in a highly publicized case, can not avoid a little of the odium which surrounds the defendant himself. People who write letters in connection with the Probation Officer's investigation do so under the supposition that their names will not be exposed to the glare of publicity. It is simply not realistic to assume that people will write letters and give relevant information in favor of a defendant who has been charged with a reprehensible offense if they know that by so doing they run the chance of having the spotlight turned on them.

We believe that the Court's attention should be called to the case of *Bryson v. United States,* No. 15,-881, in the Court of Appeals for the Ninth Circuit.

In this case a motion was made by the defense to make the probation reports there involved part of the record on appeal. This motion was ultimately denied by the Court, even though the issue in the *Bryson* case was whether or not a sentence should have been modified by the trial Court. Implicit in the *Bryson* decision is a holding that probation reports are properly confidential.

III. THERE IS NO "CASE OR CONTROVERSY" HERE.

Appellant is not appealing here from the judgment of conviction. His notice of appeal is ambiguous in this respect, since it refers to the order of denial of the presentence investigative report and goes on to say "from the judgment of the above-entitled court entered therein." In our reading of this statement by appellant it appears that the "judgment entered therein" refers back to the word "order" which appears in the same sentence. As has been previously stated such an appeal would not be from a "final order" of the District Court, since the "final order" of the District Court is the judgment of conviction. *Benson v. United States,* supra. Appellant's grounds for appeal are made abundantly clear, however, in his specification of error which reads as follows: "The Court below erred in denying defendant's motion to inspect the Probation Service's presentence investigative report made to the Court pursuant to Criminal Rule 32 (c)." Appellant in brief is not complaining about the judgment of conviction. Indeed he could not so complain, since under the provisions of Rule

20 only a plea of guilty could have been accepted in any event. He is not complaining concerning the sentence which he has received, since the sentence imposed was precisely the sentence which appellant's counsel requested at the time. At page 31 of the Transcript appellant's counsel made a plea to the Court that appellant be sentenced under the provisions of Section 5010 (b) of Title 18 United States Code, which is the Federal Youth Corrections Act. This disposition of the case was in fact ordered by the trial judge; so appellant has received exactly what he asked for.

What appellant is actually requesting from this Court is an advisory opinion as to whether or not probation reports should be supplied defense counsel in future cases. He can not contend that the lack of such a report injured him, since he received exactly what he desired.

Furthermore, in the instant case appellant's counsel actually had been informed of the details of the presentence investigation. At page 20 of the transcript counsel indicated to the Court that he was orally informed of the details of the report by the Probation Officer at length. (TR 20.) There would appear to be no requirement in reason, expediency or law that a report, if it is required to be supplied at all, must be supplied in written rather than oral form. The Court at the time asked counsel the following question: "As a matter of practice you desire to establish for the information of counsel in making a presentation to the Court on judgment?" Counsel answered: "That's right." (TR 21.)

Appellant in this case is requesting this Court to make a rule rather than requesting this Court to reverse a conviction. The sentence he received was, from his standpoint, the most desirable possible. His conviction was on his, unquestioned here, plea of guilty. Appellant desires no reversal on the part of this Court; nor does he even request a resentencing by this Court, if such a thing is possible. He simply desires this Court to amend Rule 32 (c) of the Rules of Criminal Procedure so as to provide for the inspection of presentence reports. This, we submit, is not a matter with which the Court of Appeals can concern itself constitutionally. The desirability of such a rule is not a question on which the Court of Appeals can pass.

CONCLUSION.

The judgment of the District Court should be affirmed or the appeal should be dismissed.

Dated, San Francisco, California,
October 13, 1958.

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